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COURT OF CRIMINAL APPEALS
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No. PD-0712-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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ROBERT MONTE PRICHARD, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Dallas County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully presents her Brief on the Merits.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant Appellant's request for oral argument.

STATEMENT OF THE CASE

Based on Appellant's use of a shovel and pool water to cruelly torture and kill his dog, the jury entered a deadly weapon finding. It assessed a sentence of six-and-a-half years' imprisonment. The court of appeals held that the inclusion of the deadly weapon special issue was proper and that the evidence was sufficient to support the jury's finding. *Prichard v. State*, No. 05-14-01214-CR, 2016 Tex. App. LEXIS 4126 (Tex. App.—Dallas Apr. 20, 2016).

APPELLANT'S ISSUE PRESENTED

"Is a 'deadly weapon' finding appropriate when the only thing injured or killed is a pit bull rather than a human being?"

SUMMARY OF THE ARGUMENT

The plain language of the offense of Cruelty to Non-Livestock Animals, TEX. PENAL CODE § 42.092, on its face or as applied to a set of facts and circumstances establishes the Legislature's intent to authorize a deadly weapon finding, with its direct or collateral consequences, to enhance punishment. The exercise of this unambiguous legislative prerogative does not lead to unintended consequences or absurd results. Therefore, the court of appeals correctly upheld the jury's deadly weapon finding.

STATEMENT OF FACTS

Appellant beat his family's dog on her head with a shovel and then drowned her in his backyard pool. 7 RR 254; *Prichard*, 2016 Tex. App. LEXIS 4126, at *4-8. The trial court submitted a deadly weapon special issue, and the jury entered an affirmative finding. 7 RR 254.

ARGUMENT

A deadly weapon by "usage" is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B). The capability requirement is satisfied if the actor intends to use the object in a manner in which it would be capable of causing death or serious bodily injury. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000); *see also Plummer v. State*, 410 S.W.3d 855, 858 (Tex. Crim. App. 2013) (a deadly weapon includes "*any* instrument that threatens or causes serious bodily injury, even when the instrument is not inherently or intentionally deadly.") (emphasis in original).

1. Court of Appeals

On appeal, Appellant did not challenge his use of the shovel and water to torture and kill his dog; instead, he claimed that the use or exhibition of a deadly weapon does not apply to animals—only people. *Prichard*, 2016 Tex. App. LEXIS 4126, at *2. Therefore, he maintained that the deadly weapon special issue should

not have been submitted and that the evidence did not support the jury's affirmative finding. *Id*.

The court of appeals upheld the deadly weapon finding. *Id*. at 8. First, it rejected Appellant's argument that a cruelty to non-livestock animals conviction under Section 42.092(b)(1) would always be subject to an affirmative finding and therefore render the recidivist animal cruelty enhancement provision, TEX. PENAL CODE § 42.092(c), superfluous. *Id*. at *5. The court observed that the offense can be committed by omission, which does not implicate the deadly weapon provision. *Id*. at *5. Further, the deadly weapon punishment statute, TEX. PENAL CODE § 12.35, and subsection (c) serve different purposes. *Id*. Subsection (c) elevates the offense level while Section 12.35 increases the punishment level. *Id*. Next, the court disagreed with Appellant's reliance on *Cates v. State*[1] and *Brister v. State*,[2] which discussed a "deadly weapon" finding in terms of "anyone" or "others." *Id*. at *6. Neither *Cates* nor *Brister* construed deadly weapon as applying to persons to the exclusion of animals. *Id*.

[1] 102 S.W.3d 735 (Tex. Crim. App. 2003).

[2] 449 S.W.3d 490 (Tex. Crim. App. 2014).

2. A deadly weapon is applicable in animal cruelty cases under Section 42.092(b)(1) according to the plain language of the relevant statutes.

Limiting "deadly weapon," as defined in Section 1.07(a)(17)(B), to persons, as urged by Appellant, directly conflicts with the plain text of the cruelty to non-livestock animals statute. *See Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (courts are prohibited from looking beyond the plain text unless it is ambiguous or its plain meaning would lead to an absurd result that the Legislature could not have intended).

Section 42.092(b)(1) states: "A person commits an offense if the person intentionally, knowingly, or recklessly: tortures an animal or in a cruel manner kills or causes serious bodily injury to an animal." The second clause—"in a cruel manner kills or causes serious bodily injury to an animal"—necessarily includes the use of a deadly weapon finding (assuming the elements are satisfied and there is no valid justification or defense[3]). In *Blount v. State*, this Court held that it is impossible to inflict serious bodily injury without the use of a deadly weapon. 257 S.W.3d 712, 714 (Tex. Crim. App. 2008). Although animal offenses call it "kill"[4] instead of

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[3] *See, e.g.*, TEX. PENAL CODE § 9.22 (necessity); *Chase v. State*, 448 S.W.3d 6, 28 (Tex. Crim. App. 2014) (TEX. HEALTH & SAFETY CODE § 822.013 provides a defense to persons who defend their animals from dangerous dogs and coyotes).

[4] When it comes to animals, it appears that the Legislature has made a point of (continued...)

"death," the same rationale applies to "kill"; it is impossible to "kill" without the use of a deadly weapon. *See Crumpton v. State*, 301 S.W.3d 663, 664 (Tex. Crim. App. 2000) (homicide verdict necessarily includes a deadly weapon finding); *Tyra v. State*, 897 S.W.2d 769, 798 (Tex. Crim. App. 1995) (deadly weapon finding always authorized in intoxication manslaughter and intoxication assault convictions). Serious bodily injury is defined as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE § 1.07(a)(46). Thus, "serious bodily injury" includes "death" and "kill," even if "kill" has a different subject matter. Importantly, neither of these definitions—"death" and "serious bodily injury"—mentions humans beings, so neither applies to only human beings. While "death" includes the failure of an unborn child to be born alive, TEX. PENAL CODE § 1.07(49), that proviso does not limit "death" to persons. *See* TEX. GOV'T CODE § 311.005(13) ("Include" is a term of enlargement and not of limitation; use of "include" "does not create a presumption that components not expressed are excluded."). Therefore, the plain meaning of the general definition of "serious bodily

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[4](...continued)
using the word "kill" instead of "death." *See, e.g.*, TEX. HEALTH & SAFETY CODE § 822.013(b) (a person who kills a dog under the conditions specified is not liable for damages to the owner, keeper, or person in control of the dog).

injury" does not exclude animals from its coverage.[5]

The plain language of Penal Code Section 12.35(c)(1) is also contrary to Appellant's argument. It states, in part, that a state jail felony is punishable as a third degree felony if:

> a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense . . . .

The object of the deadly weapon subject is the "commission of the offense." Section 12.35(c)(1) applies to all state-jail-felony offenses unless otherwise specified. TEX. PENAL CODE § 1.03(b) (Penal Code Titles 1-3 apply to all offenses unless the statute defining the offense states otherwise; however, the punishment provisions do not apply outside the code unless classified in accordance with it). Because Section 42.092 does not expressly exempt the state jail felony punishment provision, it is applicable. *See Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1997) (all felonies are susceptible to an affirmative finding). Therefore, punishment may be enhanced to a third degree felony due to the use or exhibition of a deadly weapon

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[5] But even if "death" applied only to an "individual" or "person," TEX. PENAL CODE § 1.07(a)(26), (38), (49), a deadly weapon finding under the clause at issue in Section 42.092(b)(1) would still be permissible. Section 42.092(b)(1) specifically enlarges the general definition of "serious bodily injury (death)" to cover "non-livestock animals." "Animals" is modified by "in a cruel manner kills" and "in a cruel manner causes serious bodily injury."

during the commission of an offense under Section 42.092(b)(1). *See Narron v. State*, 835 S.W.3d 643, 644 (Tex. Crim. App. 1992) (a deadly weapon must be used in association with a collateral felony, not when possession is the gravamen of the offense).

3. The recidivist enhancement provision is not superfluous.

For the reasons stated above, Part 2 *supra*, Appellant is correct in observing that an offense under Section 42.092(b)(1)'s "in a cruel manner kills or causes serious bodily injury" clause (but not "torture") would always be subject to a deadly weapon finding.[6] *See Blount*, 257 S.W.3d at 714 (it is impossible to inflict serious bodily injury without a deadly weapon). However, that does not render the recidivist enhancement provision in Section 42.092(c) meaningless.[7] An italicized, demonstrative breakdown of the various statutory offenses in (c) is helpful here:

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[6] *See* Appellant's Brief, at 10.

[7] Section 42.092(c) states:
An offense under Subsection (b)(3), (4), (5), (6), or (9) is a Class A misdemeanor, except that the offense is a state jail felony if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09. An offense under Subsection (b)(1), (2), (7), or (8) is a state jail felony, except that the offense is a felony of the third degree if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09.

A person commits an offense if the person intentionally, knowingly, or recklessly:			
Subsection	**Prohibition**	**Starting Offense Level**	**42.092(c) Max Offense Level**
(b)(1)	*tortures an animal* or in a cruel manner kills or causes serious bodily injury to an animal;	State Jail Felony	Felony 3
(b)(2)	without the owner's effective consent, kills, *administers poison* to, or causes serious bodily injury to an animal;	State Jail Felony	Felony 3
(b)(3)	*fails unreasonably to provide necessary food, water, care, or shelter for an animal in the person's custody*;	Class A	State Jail Felony
(b)(4)	*abandons unreasonably an animal in the person's custody*;	Class A	State Jail Felony
(b)(5)	*transports or confines an animal in a cruel manner*;	Class A	State Jail Felony
(b)(6)	*without the owner's effective consent, causes bodily injury to an animal*;	Class A	State Jail Felony
(b)(7)	*causes one animal to fight with another animal, if either animal is not a dog*;	State Jail Felony	Felony 3
(b)(8)	*uses a live animal as a lure in dog race training or in dog coursing on a racetrack*; or	State Jail Felony	Felony 3
(b)(9)	*seriously overworks an animal.*	Class A	State Jail Felony

First, the specific clause in subsection (b)(1)—"in a cruel manner kills or causes serious bodily injury to an animal"—should not on its own be used to discern the scope of subsection (c). The preceding clause directed at "torture" in (b)(1) does not implicate a deadly weapon finding in and of itself. "Torture" is defined as "any act that causes unjustifiable pain or suffering." TEX. PENAL CODE § 42.092(a)(8). It does not necessarily cause serious bodily injury.

Next, as the italicized clauses demonstrate above, there are several other provisions that do not implicate the *per se* use or exhibition of a deadly weapon. A person who committed an offense under (b)(1)'s "tortures" clause, (b)(2)'s "administers poison" clause, or an offense under subsections (b)(3)-(6) and (9) would be subject to the repeat offender provisions in subsection (c).[8] In such cases, subsection (c) serves an important purpose by authorizing the escalation of the severity of the offense for serial animal cruelty offenders. Further, the offenses defined in (b)(3)-(6) and (9) are designated as Class A misdemeanors unless enhanced to a state jail felony under (c). Once enhanced to a state jail felony, the offenses

[8] The court of appeals was not entirely correct when it said that the "fails unreasonably to provide necessary food, water, care, or shelter for an animal" provision in (b)(3) always constitutes an offense of "omission" and thus does not implicate the use of a deadly weapon. *Prichard*, 2016 Tex. App. LEXIS 4126, at *5. A deadly weapon finding may in fact be applicable in an offense charged as an omission. *See Hill v. State*, 913 S.W.2d 581, 583-84 (Tex. Crim. App. 1996) (use of chains, locks, and belts to restrain and deprive a child of food).

could be further enhanced under Section 12.35(c)(1) to a third degree felony if the deadly weapon element is satisfied.

Additionally, the implicit deadly weapon finding under subsection (b)(1) or (b)(2) does not necessarily rule out the use of subsection 42.092(c). As this Court recognized in *Crumpton v. State* in relation to the implied deadly weapon finding with a guilty verdict on homicide, "There may be a possibility of an illogical and inconsistent act of clemency, which might have the power to so act in answering a special verdict about the use of a deadly weapon." 301 S.W.3d at 665. To protect against jury nullification or a reversal on sufficiency with cases that start as a state jail felony, the State could seek a deadly weapon finding and enhancement findings under (c) to guarantee a third-degree felony punishment range. Touching on this subject, the court of appeals correctly pointed out that there is a distinction between an offense enhancing provision and a punishment enhancing one. *Prichard*, 2016 Tex. App. LEXIS 4126, at *5. There may be different direct and collateral consequences associated with each option. *See Ex parte Huskins*, 176 S.W.3d 818, 821 (Tex. Crim. App. 2005) ("A deadly-weapon finding may affect how the sentence is served, but it is not part of the sentence."). While utilizing both guarantees the third degree punishment range, the State may opt to seek an enhancement of the offense. This would set the stage for possible punishment enhancement in the future if

enhancement for an offense punishable under Section 12.35(c) is ever excluded from the habitual penalty statutes like offenses punished under Section 12.35(a). *See* TEX. PENAL CODE §§ 12.42,[9] 12.425.

The State may also make a strategic decision to abandon any subsection (c) enhancement and, instead, seek a deadly weapon finding as a means to encourage plea bargaining and influence a defendant's choice of factfinder (when the State does not demand a jury). Under Texas Code of Criminal Procedure Article 42.12(3)(g)(b), a trial court (not a jury) is prohibited from granting community supervision to a defendant when a deadly weapon finding is entered.

Finally, subsection 42.092(c) is not without any utility in a prosecution under parts of (b)(1) and (b)(2), and (b)(7)-(8) because it permits an alterative, lenient exercise of prosecutorial discretion. For example, a deadly weapon finding requires a person to serve half a sentence (or 30 years) before being eligible for parole or mandatory supervision. TEX. GOV'T CODE § 508.145(d)(1). Under the general rule, however, inmates are eligible after serving one-fourth (or 15 years) of a sentence.

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[9] For example, after *State v. Mancuso*, 919 S.W.2d 86, 89 (Tex. Crim. App. 1996), the Legislature amended TEX. PENAL CODE § 12.42 to make clear that it does not apply to state jail felonies. *See also Campbell v. State*, 49 S.W.3d 874, 878 (Tex. Crim. App. 2001) (observing that the original version of TEX. PENAL CODE § 12.35(a) did not have an enhancement provision for prior non-sequential, un-aggravated non-state jail felony convictions).

TEX. GOV'T CODE § 508.145(f).

4. DWI cases *Cates* and *Brister* have no relevance.

Appellant is wrong to rely on *Cates* and *Brister*. *See* Appellant's Brief, at 8-9. Both involved the sufficiency of the evidence to support the use or exhibition of a vehicle as a deadly weapon. Their stated requirement that "[o]thers must have been in actual danger" was in reference to the specific defendants' use or exhibition of a vehicle because, as the Court explained, a hypothetical potential for endangerment is insufficient. *Cates*, 102 S.W.3d at 738; *see also Brister*, 449 S.W.3d 494 . This Court, as the court below noted, was not faced with deciding whether animals are excluded when the associated felony is cruelty to non-livestock animals offense here. *Prichard*, 2016 Tex. App. LEXIS 4126, at *6.

Next, because this is a type of assaultive offense that necessarily establishes the elements of serious bodily injury and death, the "endangerment to others" element devised for cases in which a vehicle is used as a deadly weapon during the commission of an offense (*e.g.,* DWI,[10] Unauthorized Use of a Motor Vehicle,[11]

[10] *See, e.g., Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009) (vehicle used as deadly weapon during DWI).

[11] *See, e.g., Ramirez v. State*, No. 13-98-00077-CR, Tex. App. LEXIS 4738, at *8 (Tex. App.—Corpus Christi June 24, 1999) (not designated for publication) (vehicle used as a deadly weapon during unauthorized use of a motor vehicle).

Failure to Stop and render Aid[12]) is not an issue before the Court. However, because animals are regarded as "property"[13] it is unlikely that "others" in this context would be interpreted to embrace prohibited conduct not specifically directed at animals as defined in cruelty to livestock animals (TEX. PENAL CODE § 42.09), attack on assistance animals (TEX. PENAL CODE § 42.091), and cruelty to non-live stock animals (Section 42.092). Therefore, Appellant's cautionary, slippery-slope hypotheticals about the dog, snake, and rat[14] are improbable when the associated felony is DWI.[15] *See, e.g., Voltmann v. State*, No. 14-12-00590-CR, 2013 Tex. App.

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[12] *See, e.g., Cates v. State*, 102 S.W.3d at 739 (no evidence that the truck was driven in a deadly manner during the offense of failure to stop and render aid).

[13] *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013) (pets are valuated according to personal property principles, *i.e.*, its economic value, as opposed to any emotion-based, sentimental value).

[14] *See* Appellant's Brief, at 7.

[15] If the associated felony is cruelty to animals under Section 42.092(b)(1), finding that a vehicle was used as a deadly weapon may not be appropriate. It would depend on the circumstances, and such circumstances may arise when the conduct is not justified by necessity and/or Section 42.092(b)(1)'s mental states or conduct (intentional, knowing, and reckless) are not proven by the evidence. If the driver had no intentional and knowing *mens rea* or did not act recklessly, the "cruel manner" element may be wanting.

Appellant's criminal mischief hypothetical involving the Treaty Oak also misses the mark. *See* Appellant's Brief, at 7. Whether a deadly weapon finding is warranted would depend on whether a weapon was used or exhibited to facilitate criminal mischief. The tree itself could not provide the basis for a deadly weapon (continued...)

LEXIS 11445, at *11-12 (Tex. App.—Houston [14th Dist.] Sept. 5, 2013, pet. ref'd) (not designated for publication) (vehicle not a deadly weapon when appellant crashed into unoccupied, parked cars and no one else was present at the scene).

5. Conclusion

It is within the Legislature's authority to permit a deadly weapon finding in animal cruelty cases. The plain language of the applicable statutes demonstrate that this is exactly what was intended. There is no unforseen negative consequence or absurd result.

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[15](...continued)
finding because the Legislature has not included within a protected class unlike certain animals. *See* TEX. PENAL CODE §§ 42.09, 42.091, 42.092.

PRAYER FOR RELIEF

The court of appeals' decision should be affirmed and the trial court's deadly weapon finding reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,135 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on November 2, 2016, via email or certified electronic service provider to:

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